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MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1544

JOHN PATRICK MAHONEY,

Petitioner,

v.

STATE OF MARYLAND,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MARYLAND COURT OF APPEALS

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner was found guilty of assault with intent to murder by a jury in the Montgomery County, Maryland, Circuit Court on October 27, 1970.

At sentencing proceedings on December 16, 1970, the trial judge made appropriate and necessary inquiry into Appellant's background. The judge also asked, "Has any appeal been filed in this case?" Petitioner's counsel pointed out, "You can't file an appeal—". Indicating, as Judge

Gilbert of the Court of Special Appeals surmised, that no appeal lies until there is a final judgment. Whereupon the court inquired, "Do you contemplate filing an appeal? Do you wish to?" The answer was, "Yes". Counsel then informed the court, "Your Honor, we haven't discussed this and any appeal would be noted after sentencing." The court continued its inquiry into Appellant's background and finally dispatched the parties to the courtroom where, after argument of counsel, sentence was pronounced. Petitioner was sentenced to five years imprisonment to be followed by five years probation. Under Article 27, Section 12, Annotated Code of Maryland, Petitioner, having been convicted of assault with intent to murder, could have been sentenced for up to fifteen years imprisonment.

Petitioner took a direct appeal from the trial court's judgment to the Court of Special Appeals of Maryland alleging, *inter alia*, that the sentencing procedure denied his rights under the Constitution of the United States. On October 1, 1971, the opinion of the Court of Special Appeals of Maryland was filed, affirming the conviction and sentence. Petitioner sought a Writ of Certiorari to the Court of Appeals of Maryland which was denied on January 10, 1972. On May 25, 1972, 136 days thereafter, Petitioner filed the instant untimely Petition for a Writ of Certiorari to review the judgment of the Court of Special Appeals.

QUESTIONS PRESENTED

I. Whether or not the instant Petition for Writ of Certiorari filed out of time should be dismissed for untimeliness.

II. Whether or not the question raised by Petitioner is not moot and as such not an appropriate question on which to grant a Petition for Writ of Certiorari.

III. Whether or not the mere inquiry by a sentencing judge regarding a criminal defendant's plans for appeal absent any evidence of vindictiveness, passion, ill will, prejudice, or any other unworthy motive on the part of the judge can, standing alone, render the subsequent sentence unconstitutional as a violation of due process.

ARGUMENT

I.

THE PETITION FOR WRIT OF CERTIORARI FILED OUT OF TIME SHOULD BE DISMISSED AS UNTIMELY.

Rule 22(1) of the Rules of the Supreme Court provides as follows:

> "A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it and the certified record required by Rule 21 are filed with the clerk within ninety days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding sixty days."

The judgment of the Maryland Court of Appeals, the Maryland court of last resort, denying Petitioner's petition in that Court for a writ of certiorari to the Maryland Court of Special Appeals was entered January 10, 1972, while the instant Petition for Writ of Certiorari was filed in the Supreme Court of the United States on May 25, 1972 — 136 days thereafter.

Under these circumstances, and particularly in the absence of any excuse or justification for the untimeliness the instant petition should be dismissed forthwith.

II.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DISMISSED AS RAISING A MOOT QUESTION.

The sole issue raised in Petitioner's Brief under his heading "Questions Presented" is as follows:

> "Whether a Trial Court's inquiry into a criminal defendant's plans for appeal immediately prior to sentencing, creates such an apprehension of retaliatory motivation on the part of the sentencing judge as to unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his conviction."

From the very fact that Petitioner did take a timely direct appeal to the Court of Special Appeals of Maryland and thereupon did file a Petition for Writ of Certiorari to the Maryland Court of Appeals and to this Honorable Court, it is clear that Petitioner was in no way deterred from exercising his right to appeal. The question raised by Petitioner is obviously moot and certainly not a question on which this Court should grant a petition for writ of certiorari.

III.

ABSENT EVIDENCE OF VINDICTIVENESS, PASSION, ILL WILL, PREJUDICE OR ANY OTHER UNWORTHY MOTIVE ON THE PART OF THE SENTENCING JUDGE, THE MERE INQUIRY FOLLOWING VERDICT BUT PRIOR TO SENTENCING INTO A CRIMINAL DEFENDANT'S PLANS FOR APPEAL IS NOT A VIOLATION OF DUE PROCESS.

Respondent submits that on the facts of this case, as correctly found by the Court of Special Appeals of Maryland in *Mahoney v. State*, 13 Md. App. 105, 281 A.2d 421, Petitioner was not denied due process of law as a result of the procedures followed by the sentencing judge. As that Court stated in its opinion:

> "The sentence imposed in this case was well within the limits of the statute, and we cannot say, on the bare record before us, that it was motivated by pas-

sion, ill will, prejudice, or some other unworthy motive. Nor can we say that it was 'vindictive' as a result of Appellant's [Petitioner herein] response to the trial judge's inquiry relative to an appeal."

This Honorable Court pointed out in *Williams v. New York*, 337 U.S. 241, 93 L. Ed. 1337, 69 S. Ct. 1079, that tribunals passing on guilt of a defendant have always been hedged in by strict evidentiary procedural limitations, but traditionally, and for sound practical reasons, a sentencing judge may exercise wide discretion in the reception of information at the sentencing stage of the criminal proceedings. It is apparent that unless the sentencing procedure is to be frozen by the "due process" clause in the restrictive mold of trial procedure (rejected by this Court in *Williams*), this wide discretion is a necessary adjunct to the sentencing process.

Obviously, in the reception of this wide scope of information the sentencing judge must, as part of the exercise of his discretion, select that which is relevant and discard that which is irrelevant. The mere reception of information that is irrelevant to the sentencing process does not in itself demonstrate an abuse of discretion. In order for the procedure to be violative of the "due process" clause, there must be some evidence of abuse of discretion on the part of the sentencing judge. *Williams, supra.*

The law of Maryland as applied by the Court of Special Appeals in this case recognizes that there may be violations of the "due process" clause in the sentencing proceedings, but within the framework of *Williams* requires some evidence that the judge was motivated by passion, ill will, prejudice, or some other unworthy motive in passing sentence. *Johnson v. State,* 9 Md. App. 37, 262 A.2d 325; *Minor v. State,* 6 Md. App. 82, 250 A.2d 113. In the case at bar the Court of Special Appeals of Maryland

found as a matter of fact that there was no such evidence on the record before it. There can be no disagreement, Respondent submits, with this conclusion.

Particularly in light of the relatively mild sentence imposed for the serious crime Respondent committed and that the inquiry by the sentencing judge regarding Petitioner's intent to appeal was relevant to the setting of bail for Petitioner pending his appeal (see Respondent's Exhibit A, Docket Entries) and keeping in mind that Petitioner did not even see fit to apply for an independent review of his sentence by a panel of judges not including the sentencing judge under Rule 762 of the Maryland Rules of Procedure and Article 26, Section 132, Annotated Code of Maryland, it is apparent that Petitioner's contentions are without merit.

Under all the circumstances, there is no reason for this Court to grant the instant Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the instant Writ of Certiorari should be denied.

Respectfully submitted,

FRANCIS B. BURCH,
Attorney General of Maryland,

EDWARD F. BORGERDING,
Assistant Attorney General
of Maryland,
Chief, Criminal Division,

GARY MELICK,
Assistant Attorney General
of Maryland,

Counsel for Respondent.

APPENDIX

Respondent's Exhibit A

DOCKET ENTRIES

Criminal No. 10664

Assault with Intent to Murder;
Assault and Battery; Assault

State of Maryland

v.

John Patrick Mahoney

December 4, 1969—Presentment: Indictment; True Bill filed, and Bench Warrant issued.

December 4, 1969—Recognizance No. 5574 — $1,000.00 Cash Bond filed in Miscellaneous Petition No. 4116.

December 8, 1969—Sheriff's Return on Bench Warrant — Recognized — filed.

December 19, 1969—Copy of Indictment handed to Defendant.

December 19, 1969—Arraigned by Judge Mathias, waived reading of Indictment, Plea Not Guilty to each Count, request Trial by Jury, Mrs. Kiebler reporting.

December 19, 1969—Defendant continued on $1,000.00 Cash Bond.

February 3, 1970—Defendant's Motion for Discovery and Inspection, filed.

February 9, 1970—State's Answer to Motion for Discovery and Inspection filed.

March 16, 1970—State's Motion for Continuance before Judge Moorman and Motion granted, Miss Duncan reporting.

July 15, 1970—Defendant's Motion for Continuance, filed.

July 17, 1970—Order of Court granting Defendant's Motion for Continuance, filed.

September 29, 1970—State's Supplemental Answer to Motion for Discovery and Inspection, filed.

October 26, 1970—Jury Sworn: Foreman - Jeanette M. Martin, 2 - Trula M. Benedict, 3 - Robert M. Schmiech, 4 - Alvin H. Sabel, 5 - Ruth T. Bradford, 6 - Wilhelmina Terry, 7 - John J. Rodman, 8 - Edith I. Seek, 9 - Norma E. Recorsro, 10 - Frances P. Hickey, 11 - Claire L. Finkelman, 12 - Mary E. Becraft, and Trial Judge Shearin presiding, Miss Lowe reporting.

October 26, 1970—State abandons 2nd Count of the Indictment.

October 26, 1970—At close of State evidence Defendant moves for Judgment of Acquittal and Motion Denied.

October 26, 1970—At close of all evidence Defendant renews Motion for Judgment of Acquittal and Motion Denied.

October 27, 1970—Trial resumed, Miss Lowe reporting.

October 27, 1970—Verdict - Guilty on 1st Count of the Indictment. (Assault with Intent to Murder).

October 27, 1970—Defendant remanded to custody of Sheriff pending Pre-Sentence Investigation.

October 27, 1970—Request for Pre-Sentence Investigation filed.

October 27, 1970—State's Exhibits Nos. 1, 2, 3, 4, 5, 6 and 8 admitted and filed.

October 27, 1970—State's Exhibit No. 7 marked for Identification and filed.

October 27, 1970—Exhibit Sheet filed.

November 6, 1970—Defendant's Motion to Set Bond Pending Sentence, filed.

November 6, 1970—Order of Court that Bond in the amount of $5,000.00 be set in this Case, filed.

December 3, 1970—Check No. 1155 for $1,000.00 issued to Julia Numez, refund cash Bond Recognizance No. 5574.

December 3, 1970—Recognizance No. 6651 — $5,000.00 — Ford — filed.

December 16, 1970—Defendant was asked if he had anything to say before the Court passes sentence.

December 16, 1970—Court sentences the defendant to the Jurisdiction of the Maryland Department of Correction for a term of Ten (10) years. Court suspends 6th through 10th year of Sentence. Defendant after release to be placed on Probation for remainder of 10 year Sentence Defendant to be given credit for 2 months confinement in Montgomery County Detention Center, Mrs. Davis reporting.

December 16, 1970—Defendant's Line noting Appeal to the Court of Special Appeals, filed.

December 16, 1970—Defendant's Motion to Set Appeal Bond, filed.

December 17, 1970—Commitment issued and delivered to Sheriff.

December 17, 1970—Defendant's Motion for Extension of Time for Transmitting Record, filed.

December 17, 1970—Order of Court that Bond in the amount of $5,000.00 be and the same is hereby set until such a time as the Maryland Court of Appeals enters Judg-

December 3, 1970—Recognizance No. 6551 — $5,000.00 —

December 18, 1970—Defendant's Petition for Writ of Habeas Corpus ad Prosequendum, filed.

December 18, 1970—Order of Court granting Defendant's Petition for Writ of Habeas Corpus ad Prosequendum, filed.

December 18, 1970—Writ issued returnable December 21, 1970 at 10:00 A.M.

December 21, 1970—Writ returned, filed.

December 21, 1970—Recognizance No. 6605—$5,000.00—Ford — filed.

December 30, 1970—Order of Court that time for transmitting Record be and the same is hereby extended to March 16, 1971.

March 9, 1971—Three (3) Volumes of Testimony, filed.
W. A. Linthicum, Jr. — State's Attorney
Bell & Bell — Attorneys for the Defendant